IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

LETTERS PATENT APPEAL No 80 of 1999

in

SPECIAL CIVIL APPLICATIONNo 10160 of 1998

For Approval and Signature:

Hon'ble CHIEF JUSTICE MR DM DHARMADHIKARI
and
Hon'ble MR.JUSTICE C.K.THAKKAR

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

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COMPETENT OFFICER

Versus

GANGARAM PARASRA PAVANI ALIAS PAVAR

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Appearance:

MR PRASHANT G DESAI for Appellant

MR PREMAL R JOSHI for Respondent No. 1

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CORAM : CHIEF JUSTICE MR DM DHARMADHIKARI
and
MR.JUSTICE C.K.THAKKAR

Date of decision: /03/2000

CAV JUDGEMENT

Per Thakker, J.:

This appeal is filed by the Ahmedabad Municipal Corporation against the judgment and order of the learned Single Judge on December 28, 1998 in SCA No. 10160 of 1998.

Respondent was the original petitioner. He approached this Court for an appropriate writ, order or direction quashing and setting aside the order dated December 23, 1998 at Annexure `A' to the petition restraining the corporation from forcibly dispossessing the petitioner from disputed shop No. 28 of Navrangpura Municipal Market.

It was the case of the petitioner that the respondent corporation had constructed certain shops in the Municipal Market at Navrangpura which were leased to various allottees on the terms and conditions mentioned in the lease deed. One of such shops being shop No.28 was allotted to the petitioner with liability to pay monthly rent of Rs. 51/- exclusive of municipal taxes and education cess. The petitioner was occupying the said shop. It was the allegation of the petitioner that he was illegally deprived of possession of the said shop and, forcible possession was taken by the corporation. He, therefore, approached this Court by filing SCA No. 444 of 1985 which was allowed by the learned Single Judge on August 24, 1993 . The petitioner was asked to pay the amount due and payable to the corporation. Para 7 which was operative part of the said order read as under :

"7. Following order is therefore required to be passed:

The petitioner is directed to file undertaking in this court latest by 3.9.1993 stating therein that the petitioner shall pay the aforesaid amount of Rs. 1,78,027.50 in eight equal quarterly instalments commencing from 1st September 1993 also stating in the undertaking that he shall pay the rent which starts falling due from 1.9.1993 regularly without any default. Upon the petitioner committing any default in payment of any of the instalments as also any of the monthly rent for all the months commencing

from 1.9.1993, it would be open to the respondent to seal the premises and take possession without any further process of law. Upon filing of the undertaking as stated above,the respondent hall hand over the possession of the premises in question to the petitioner.

Rule made absolute only to the aforesaid terms with no order as to costs."

It was the say of the petitioner that in spite of best efforts, he could not pay some of the instalments and thus,there was default on his part. Though it was expected of the corporation to consider the case of the petitioner sympathetically, the corporation only with a view to deprive the petitioner of his legitimate rights, forcibly dispossessed him. The petitioner, in these circumstances, was constrained to approach once again to this Court by filing the present petition. Learned Single Judge before whom the matter came up for hearing, heard the learned advocates and allowed the petition. Learned Single Judge observed:

"On behalf of the respondent corporation, it has been submitted that in view of the order passed by this court, the respondent is justified in taking the possession of the shop in question as the petitioner has failed to make the payment even though an undertaking has been filed. It is true that the petitioner is a defaulter and has failed to fulfil his obligation given by way of undertaking and,therefore, the respondent corporation was justified in not accepting the payment. However, considering the interest of the parties and especially the dues of the corporation are involved and,if the petitioner is ready and willing to make the payment, I am of the opinion that the petitioner deserves one more chance. On behalf of the respondent corporation, it is submitted that till the date, the corporation owns Rs.1,63,356.06 p. by way of rent, tax interest ,late fee charges etc,. The learned advocate for the petitioner Mr. Joshi after taking instructions from the petitioner, accepted the aforesaid figure given by the respondent corporation and does not dispute the same.

In view of this, out of aforesaid amount of Rs.

1, 63, 356.06 p., the petitioner shall make the down payment of Rs. 63,356.06 p. within a week from today to the respondent corporation . On making such payment, the respondent corporation shall open the seal of the premisses and hand over the possession of the shop in question with the furniture and fixture as stated ion annexure A . With regard to the balance amount, the petitioner shall clear the same on or before 31.3.1999. Over and above the said payment, the petitioner shall regularly make the payment of the rent starting from 1.1.1999 and shall pay the same regularly without any default. Upon the petitioner committing any default in payment of the amount as stated above, as also in any of monthly rent commencing from 1.1.1999, it would be open to the respondent corporation to seal the premises and take the possession without any further process of law. The petitioner shall file an undertaking abiding by the aforesaid directions within a week from today.

Rule made absolute with no order as to costs. D. S. permitted."

It is this order which is challenged by the corporation in the present appeal.

When the matter was placed for admission, initially, notice was issued and after hearing the parties, the appeal was admitted. On the civil application, ad-interim relief was also granted which was made interim relief till disposal of LPA and the civil application stood disposed of.

The matter was thereafter placed for final hearing.

We have heard Mr. P.G.Desai for the appellant and Mr. Premal Joshi for the respondent-original petitioner.

Mr. Desai submitted that the learned Single Judge has committed an error of law and of jurisdiction in allowing the petition and granting instalments which could not have been done under Article 226 of the Constitution. He further submitted that even in earlier petition, learned Single Judge was liberal and even though substantial amount was not paid by the petitioner, instalments were granted . But even thereafter, there was default on the part of the petitioner in making payment and possession was taken over by the corporation as per the order of the

learned Single Judge. In these circumstances,the second petition could not have entertained and allowed by directing the corporation to continue the petitioner as an allottee. Such an order has seriously prejudiced the corporation

Mr Desai also submitted that the corporation is an instrumentality of State . On one hand, there was consistent default in making the payment of rent by the petitioner and yet, he is protected by the Court, and on the other hand, the corporation is deprived of its legitimate dues. He stated that if the disputed shop will be given on rent at present by inviting tenders, substantial amount can be earned by the corporation. which can be utilised for public purpose. He, therefore, submitted that the order passed by the learned Single Judge deserves to be quashed and set aside.

Mr. Joshi, on the other hand, supported the order passed by the learned Single Judge. He submitted that it is true that earlier, the petitioner could not pay the amount and he was in default. Learned Single Judge allowed the petition and granted instalments. He conceded that even thereafter , because of financial constraints, the petitioner could not pay regular instalments. He , however, stated that the petitioner tried to pay the amount but the corporation did not get those cheques encashed. Considering all those facts and financial difficulties of the petitioner, if the learned Single Judge has shown mercy and allowed the petition by exercising discretion in favour of the petitioner, such discretion may not be interfered with by this Court.

In the facts and circumstances of the case, in our opinion, when learned Single Judge has considered the circumstances and exercised his discretion, it would not be proper on our part to interfere with exercise of discretion. It is true that initially, there was default on the part of the petitioner in paying instalments and this Court protected him. Once again, there was such default. But when the learned Single Judge has considered all the circumstances and passed the order directing the petitioner to make payment as a last chance, it would not be proper to set aside such order.

At the same time, while disposing of this appeal, we cannot be unmindful of the fact that in previous litigation, in spite of the order of this Court and undertaking by the petitioner, there was default on the part of the petitioner in making payment. It also clear that regular instalments were not paid. It is,therefore,

in the fitness of things if the petitioner is directed to pay the entire amount due and payable before he is restored possession of the disputed shop. As stated above, when the appeal was admitted, ad-interim relief was granted and confirmed after hearing the parties and the order passed by the learned Single Judge directing the corporation to hand over possession of disputed shop No. 28 to the petitioner was stayed. Thus, at present, possession is with the corporation. It is,therefore, directed that possession will not be given over to the petitioner until he pays the entire amount to the corporation. The petitioner will also file an undertaking that he would regularly pay amount of rent and will not commit any default in future.

For the foregoing reasons, LPA deserves to be disposed of by directing the petitioner -respondent herein to pay the entire amount due and payable by him and to the appellant corporation to restore possession of disputed shop No.28 to the petitioner on his paying the said amount to the Corporation . In the facts and circumstances,there shall be no order as to costs.

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parekh